FCC 95-192

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Petition of New York State	)	PR Docket No. 94-108
Public Service Commission	)	
To Extend Rate Regulation	)	

REPORT AND ORDER

Adopted: May 4, 1995; **Released**: May 19, 1995

By the Commission:

I. INTRODUCTION

1. On August 9, 1994, the New York State Public Service Commission (hereinafter "New York" or "NYPSC"), on behalf of that state, petitioned us to retain state regulatory authority over the rates for intrastate cellular service within New York State.[1] Fourteen parties filed pleadings opposing the Petition, in whole or in part; two parties filed pleadings supporting it.[2] By this action, we deny the Petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.[3] Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated

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[1] Petition of New York State and the New York State Public Service Commission To Extend Rate Regulation, PR Docket No. 94-108, filed Aug. 9, 1994 (hereinafter "NYPSC Petition").

[2] A list of parties that filed pleadings in this proceeding appears at Appendix A, *infra*.

[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

symmetrically in ways that promote marketplace competition;[4] (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;[5] and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.[6]

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of CMRS.[7] As an exception to this general rule, Congress also provided that, if a state had "any regulation" concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."[8]

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state seeking to retain regulatory authority must "clear substantial hurdles" in demonstrating that continued regulation is warranted.[9] We also determined that the nature of a state's burden of proof is delineated generally by the statute itself. Specifically, we found that:[10]

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[4] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (1994) (*CMRS Second Report and Order*), *reconsideration pending*.

[5] National Telecommunications and Information Administration Organization Act, § 113(b)(1).

[6] The competitive bidding methodology is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays ...." 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

[7] *See* 47 U.S.C. § 332(c)(3)(A).

[8] *See* 47 U.S.C. § 332(c)(3)(B).

[9] *See CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[10] *Id.*, 9 FCC Rcd at 1421.

> [I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [*sic*] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be grounded on demonstrable evidence.[11] In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be pertinent and helpful to our consideration of a state petition.[12] Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.[13] We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.[14] In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising Federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."[15] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

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[11] *Id.*, 9 FCC Rcd at 1504.

[12] 47 C.F.R. § 20.13.

[13] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505.

[14] Under *Louisiana PSC*, the Commission may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana Pub. Ser. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal policy. *See* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); National Ass'n of Reg. Util. Comm'ners v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[15] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

III. DECISIONAL FRAMEWORK

6. The pleadings present two threshold procedural matters that we must address before addressing the NYPSC's Petition on its merits. First, some parties argue that the petition is fatally flawed because it requests regulatory authority only over cellular service rather than all CMRS services, thereby violating what these opponents claim is the fundamental OBRA goal of achieving symmetrical regulatory treatment of CMRS. Second, the parties take issue with each other's characterizations of the appropriate burden of proof in this proceeding.

A. Cellular-Only Regulation

1. Pleadings of the Parties

7. Various opponents of the Petition argue that: (1) Congress revised Section 332 of the Act to establish regulatory parity, remedy the disparate regulatory treatment of similar forms of CMRS, and create a uniform, nationwide regulatory regime; (2) by seeking to impose regulation only on cellular services, the NYPSC would impose inconsistent regulations on different CMRS providers, thereby creating precisely the asymmetrical regulatory conditions Congress sought to remedy; and (3) accordingly, the NYPSC's Petition must be rejected because it seeks to impose a type of regulatory regime expressly rejected by Congress.[16] A variant of this argument also is presented in the record. Essentially, some opponents of the Petition argue that: (1) regulatory parity is required by the statute; (2) in order to regulate *any* CMRS a state must demonstrate that market conditions warrant regulating *all* CMRS; (3) the NYPSC has not submitted a showing relating to non-cellular CMRS market conditions; and (4) accordingly, the Petition must be dismissed.[17]

8. The NYPSC and its supporters dispute these arguments. While they acknowledge that regulatory parity is a goal of OBRA, these parties argue that Congress expressly recognized that differential regulatory treatment of CMRS providers is permissible under the Act.[18] Some of these parties also claim that differential regulatory treatment of cellular and non-cellular services by a state is not only lawful, but it should be required because there is no evidence in this record or elsewhere that non-cellular CMRS providers currently possess market power, thus making regulation of their activities inappropriate.[19]

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[16] *See, e.g.*, CTIA Comments at 8-10; GTE Comments at iii, 1-3, 18-26; McCaw Comments at 8-11.

[17] *See, e.g.*, RCA Reply at 1-3.

[18] *See, e.g.*, NYPSC Reply at 2, 4-6; Nextel Comments at 11; Nextel Reply at 3-5.

[19] *See, e.g.*, E.F. Johnson Comments at 4-5; AMTA Comments at 5-6; MTel Comments at 5; NCRA Comments at 3-4.

2. Discussion

9. We have determined in other proceedings that while regulatory parity is a significant policy that can yield important pro-competitive and pro-consumer benefits when appropriately applied, parity for its own sake is not required by any provision of the Act.[20] Indeed, the Act allows us to adopt a flexible regulatory scheme that treats certain CMRS in a streamlined fashion.[21] Congress recognized that market conditions might warrant differential regulatory treatment of CMRS, and it explicitly granted us the authority to forbear from applying certain provisions of the Act.[22] That Congress understood such forbearance might be exercised selectively is not in doubt. As the OBRA Conference Report states in explaining our forbearance authority:[23]

> The purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.

Nothing in the record of this proceeding, or elsewhere to our knowledge, demonstrates that Congress intended to deny states similar flexibility with regard to the exercise of their CMRS regulatory authority. Thus, we are not persuaded by arguments that the NYPSC's request to regulate only cellular services is fatally incongruent with the regulatory parity concepts established in OBRA.

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[20] *See* Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Tranferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 9 FCC Rcd 5836, 5858 (1994) (*Craig O. McCaw*), *appeal pending on other grounds sub nom.* BellSouth Corp. v. FCC, D.C.Cir. No. 94-639, filed Sept. 23, 1994; *see generally* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 7988 (1994).

[21] *See CMRS Second Report and Order*, 9 FCC Rcd at 1463.

[22] Section 332(c)(1)(A) provides that the Commission may determine that any provision of Title II may be specified as "inapplicable to [any] service or person" otherwise treated as a common carrier. 47 U.S.C. § 332(c)(1)(A).

[23] H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 491 ("Conference Report"). The Conference Report further provides that "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section." *Id.*

B. Burden of Proof

1. Pleadings of the Parties

10. A second threshold issue addressed by the parties concerns the evidentiary standard to be applied in assessing a state's petition on the merits. The NYPSC contends that, "in a market such as the cellular market, where there are only two providers of a service and there are no currently available substitutes, actions taken by one firm may not result in a normal competitive reaction by the only other firm."[24] The NYPSC argues, in essence, that the duopolist nature of the cellular industry, *per se*, provides sufficient evidence of failed market conditions to authorize continued rate regulation by the state.

11. NCRA, too, contends that the duopolist nature of the cellular industry, of itself, warrants continued rate regulation by the state. It alleges, in support, that "since 1985, the [FCC] has classified licensed cellular carriers as dominant common carriers" and has "tentatively conclud[ed] that cellular carriers should have equal access obligations imposed upon them in accordance with [its] findings that there is not sufficient evidence to conclude that the cellular services marketplace is fully competitive."[25] Nextel, as well, argues that the duopolist character of the cellular industry compels us to grant New York's Petition. It observes that, "[u]nfortunately, the cellular industry has historically exhibited duopoly market conditions and has been a source of continuing concern for the petitioning states."[26]

12. In opposition, many commenters emphasize that the existence of a duopolist market structure and arguments that such a market is thus less than "fully competitive" are, of themselves, insufficient to sustain a petitioning state's burden of proof.[27] They variously characterize this burden of proof as "substantial"[28] or "extremely demanding"[29] or requiring a "compelling showing."[30] Several cite, in support, our statement in the *CMRS Second*

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[24] NYPSC Petition at 3-4 (footnotes in original omitted).

[25] NCRA Comments at 4, citing, without specific reference, *CMRS Second Report and Order*, and Notice of Proposed Rule Making and Notice of Inquiry, In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Docket No. 94-54, released July 1, 1994.

[26] Nextel Comments at 9-10.

[27] NYNEX Reply at 3; McCaw Comments at 5; CCI Comments at 16-18; CTIA Comments at 7-10; GTE Reply at 11; RTC Comments at 4-6; RTC Reply at 2; PageNet Comments at 3.

[28] CTIA Comments at 5-7.

[29] McCaw Comments at 4.

[30] AMTA Comments at 5.

Report and Order that a petitioning state must "clear substantial hurdles"[31] in order to overcome the statutory presumption of preemption, and emphasize that a state must establish "unique circumstances" within its jurisdiction in order to prevail on the merits.[32]

13. One commenter argues for a tripartite test, each element of which would be required to be satisfied before a state could continue to regulate intrastate CMRS rates: that there be substantially less competition in the particular state's market than exists at the national level; that Federal remedies be inadequate to redress the problem; and that the benefits of state regulation outweigh its costs.[33]

14. Several commenters filing pleadings in various of the state petitions dockets currently pending before us have suggested with respect to the burden of proof issue that our findings in the *CMRS Second Report and Order* on competition in the CMRS market and, in particular, the cellular market, place a greater burden on petitioning states attempting to prove failed market conditions. They note, with respect to the latter, our determination in the *CMRS Second Report and Order* that "there is some competition in the cellular marketplace."[34] Others go further and claim that state rate regulation is "presumptively inconsistent with the objectives of section 332(c)," and is effectively barred in light of our decision to forbear from requiring the filing of interstate rates for CMRS.[35]

15. In response, the NYPSC and Nextel argue that regulatory parity does not preclude intrastate rate regulation even if the Commission has forborne from tariffing, and that Congress could not have thought otherwise or it would not have provided for a state petitioning process in the face of possible Federal forbearance from rate regulation.[36]

2. Discussion

16. In order to prevail on the merits, the NYPSC must sustain its statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly

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[31] *CMRS Second Report and Order*, 9 FCC Rcd at 1421.

[32] *See, e.g.*, PCIA Comments at 5.

[33] McCaw Comments at 11-15.

[34] *See CMRS Second Report and Order*, 9 FCC Rcd at 1472.

[35] McCaw Comments at 6; CCI Comments at 11-12; CTIA Comments at 2, 4, 7-9; AMTA Comments at 4-5; Nextel Comments at 3-4 (noting the cross-state nature of mobile services mentioned in the legislative history).

[36] NYPSC Reply at 4-11; Nextel Reply at 13-16.

or unreasonably discriminatory."[37] A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties' debate in this record. As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state's petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service[38] have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

17. Since the Budget Act does not explicitly construe or elaborate on the phrase "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory," we look to the "design of the statute as a whole and its object and policy" to give that phrase meaning.[39] We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also speak of just and reasonable rates.[40] We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive market operations.[41] The more formal description, however, is whether rates fall within a "zone of reasonableness" that is bounded at one end by the "investor interest in maintaining financial integrity and access to capital markets" and at the other by the "consumer interest in being charged non-exploitative rates."[42] Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by

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[37] 47 U.S.C. § 332(c)(3).

[38] Although the provisions of Section 332(c)(3) of the Act apply to rate or entry regulation in the case of any commercial mobile radio service provider, the NYPSC Petition is oriented to the provision of cellular service.

[39] *See* Crandon v. United States, 494 U.S. 152, 157 (1990); McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[40] *See* 47 U.S.C. § 201; *see also* 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

[41] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886, 2889-2900 (1989); *see also* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.

[42] *See, e.g.*, FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988); *see also* FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

reference to carriers' costs and earnings,[43] but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.[44] These principles define basic components of a state's demonstration under Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a "zone of reasonableness," which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

18. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: "no State ... shall have any authority to regulate" CMRS rates.[45] As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) ("State Preemption"), express an unambiguous congressional intent to foreclose state regulation in the first instance.[46] Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS

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[43] *See* FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs.") (citation omitted); *see also* Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05, *reh'g denied,* Bass v. FPC, 392 U.S. 917 (1968) (upholding ratemaking based upon area-wide average costs).

[44] *See, e.g.,* Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

> Mobil's argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional "non-cost" incentives on the evidence of a need for increased supplies.

Id. at 316. *See also* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir), *cert. denied,* 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); Public Service Comm'n of New York v. FERC, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

[45] 47 U.S.C. § 332(c)(3).

[46] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

regulation,[47] and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.[48]

19. Unlike some of the opponents of the NYPSC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;[49] (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed "rapidly" through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal of stimulating economic opportunity and competition;[50] and (3) in contemplation of the deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.[51]

20. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving,[52] and it provided the resources (*e.g.*, additional

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[47] 47 U.S.C. § 332(c)(1)(A).

[48] 47 U.S.C. § 332(c)(1)(C).

[49] OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

[50] *See* OBRA § 6002(a), amending Section 309 of the Communications Act.

[51] *See* 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

[52] The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. *See* Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international

spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.[53] Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.[54]

21. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of "market conditions" in the context of Section 332(c)(3) necessarily is governed by that framework.

22. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that New York or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Commission established the two-carrier cellular market structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities.[55]

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allocations decision making fora that recognized and permitted the use of such spectrum for PCS and other emerging technologies on a global scale. *See* Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. *See* OBRA § 6002(d)(2)(B).

[53] *See CMRS Second Report and Order*, 9 FCC Rcd at 1421; *see also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

[54] *Id.*

[55] *See, e.g.*, Cellular Communications Systems, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

Other Federal agencies have taken similar positions.[56]
One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that "[w]hile GAO found no evidence of anticompetitive or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."[57] It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly prohibited state regulation of CMRS.[58] Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.[59]

23. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.[60] For example, we have attempted to heighten cellular competition at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between

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[56] *See* Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 ("[T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]"); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 ("[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market."), 10-12.

[57] United States General Accounting Office, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," GAO/RCED-92-220 (July 1992) (GAO Report).

[58] *Cf.* Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord* Miles v. Apex Marine Corporation, 489 U.S. 19 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Minneapolis & St. Louis Railway Co. v. United States, 361 U.S. 173 (1959).

[59] *Cf.* McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

[60] *See, e.g.*, GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. *See* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

the two licensees in each local market.[61] We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.[62] Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

24. The framework of our CMRS regulatory policy -- moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by regulating existing licensees -- aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.[63] As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,[64] not a policy that is balkanized state-by-state.

25. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work. With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:[65]

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[61] *See Cellular Resale Order,* 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry*), Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

[62] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

[63] If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

[64] See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

> [B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

[65] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

> [i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

26. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impossible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that Congress would have established two separate statutory procedures -- one to govern our forbearance, and another to govern states' petitions[66] -- if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

27. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,[67] and such conditions can produce good results for consumers.[68] In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

28. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to

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[66] *See* 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

[67] In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. *See* D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

[68] *See, e.g.*, W. Baumol, J. Panzar & R. Willig, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 15-46 (1982).

perform a Structure-Conduct-Performance (''SCP'') analysis,[69] which is a standard paradigm of modern industrial organization analysis.[70] This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the number of competitors, the cost structure, and the degree of integration with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry structure and allows us to determine whether and how consumer interests are being served by such activity.

29. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce ''specific allegations of fact,'' to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding ''anticompetitive or discriminatory practices or behavior by commercial mobile radio service providers.''[71] We also requested ''[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces,'' and we indicated that we would consider such evidence ''especially probative.''[72]

30. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,[73] and ''an

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[69] Section 20.13(a)(1) requires states to include ''demonstrative evidence'' establishing failed market conditions. *See* 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. *See* 47 C.F.R. § 20.13(a)(2)(vi).

[70] *See, e.g.*, F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, 4-7 (3d ed. 1990) (''Scherer and Ross''); D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION, chs. 1, 9 (2d ed. 1994); J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 1-3 (1988).

[71] 47 C.F.R. § 20.13(a)(2)(vi).

[72] 47 C.F.R. § 20.13(a)(2)(vii).

[73] 47 C.F.R. § 20.13(a)(2)(i) and (ii).

assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state.''[74] We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.[75] In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on ''trends'' in each commercial radio provider's rates and customer base[76] and on ''opportunities for new providers to enter into the provision of competing services'' as well as ''an analysis of any barriers to such entry.''[77] In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they see fit,[78] the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

31. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

32. While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.[79] Under the case law potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing

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[74] 47 C.F.R. § 20.13(a)(2)(iv).

[75] 47 C.F.R. § 20.13(a)(2)(viii).

[76] 47 C.F.R. § 20.13(a)(2)(ii) and (iii).

[77] 47 C.F.R. § 20.13(a)(2)(v).

[78] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[79] *See, e.g.*, McCaw Personal Communications, Inc. v. Pacific Telesis Group, 645 F.Supp. 1166, 1174 (N.D. Cal. 1986) (''the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high''), *citing* United States v. Waste Management, Inc., 743 F.2d 976, 982- 83 (2d Cir. 1984). *See also* American Bar Association, I ANTITRUST LAW DEVELOPMENTS (THIRD) 307-11 (1992) and cases cited therein.

competitors,[80] and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in markets encompassing New York have committed to pay substantial sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment.

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[80] *See* FTC v. Owens-Illinois, Inc., 681 F.Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning "the extensive present and future intermaterial competition in the glass and other packaging industries," "[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic"); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992)(*Merger Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: "In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact") (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

BROADBAND PCS AUCTION RESULTS

New York					
MTA #	**Freq. Blk.**	**State**	**Market**	**Winning Bidder**	**Winning Bid**
M001	A	New York	New York	Omnipoint Corporation	$347,518,309[81]
M001	B	New York	New York	WirelessCo, L.P.	$442,712,000
M035	A	New York	Buffalo-Rochester	WirelessCo, L.P.	$18,893,000
M035	B	New York	Buffalo-Rochester	AT&T Wireless PCS Inc.	$19,864,000

33. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It *is* happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge that reasonably soon they will face new competition from PCS licensees.[82] The advent of

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[81] This figure represents the amount to be paid by the pioneer's preference licensee, as required by Section 309(j)(13) of the Communications Act. *See* American Personal Communications, Washington-Baltimore MTA #10, Frequency Block A; Cox Cable Communications, Inc., Los-Angeles-San Diego MTA #2, Frequency Block A; Omnipoint Communications, Inc., New York MTA #1, Frequency Block A; For Initial Authorizations in the Broadband Personal Communications Service, Memorandum Opinion and Order, 10 FCC Rcd 1101 (1994).

[82] *See, e.g.*, COMM. DAILY, Apr. 24, 1995, "*Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS*" (report on independent researcher's projection of cellular service rate cuts "up to 40%" over next two years); COMM. DAILY, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is $24.99, with additional min. at 29 cents in home county, 99 cents elsewhere"); M. Mills, *Wireless: The Next Generation*, WASH. POST, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal -- Bell Atlantic, NYNEX Plan to Merge Their Mobile and*

PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.[83] Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantial and pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

34. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

35. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the statutory goal of promoting investment in the cellular infrastructure. In that event, the rates underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance

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Cellular Divisions as PCS Players Continue Consolidation, INFORMATIONWEEK, Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

[83] *See, e.g.*, Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 ("Description of Transaction and Public Interest Statement") at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending*; *Craig O. McCaw*, 9 FCC Rcd at 5862-63.

of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

36. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic factors.[84] For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.[85] Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.[86] Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

37. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to be persuasive. Those demonstrations that are tied most closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

IV. NEW YORK PETITION

A. Summary of NYPSC Request

38. The NYPSC requests that it be authorized to continue to regulate the rates of cellular telephone companies and resellers of cellular telephone service.[87] It states that it is not proposing any new regulations and that its request is limited to enforcing those regulations presently in place for cellular carriers.[88] The NYPSC advises that it presently lacks statutory authority to regulate one-way paging or two-way mobile telephone services

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[84] *See, e.g.*, J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 209-70 (1988).

[85] *Id.* at 239-70.

[86] In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.

[87] NYPSC Petition at 2.

[88] NYPSC Reply at 16.

other than cellular services and that it will seek Commission authority to regulate the rates for such services only if, and at such time, it is accorded that regulatory authority by state law.[89]

39. The NYPSC argues that competition in the New York State (or any) cellular market is imperfect because of the duopolist nature of the cellular industry, but contends that the industry's anticompetitive impulses have been held in check in New York by the NYPSC's regulatory "oversight."[90] It proffers information on prices, return on equity, and market share as evidence of a potential lack of competition in the New York cellular market and attributes the "nondispositive," "mixed record" it has compiled with respect to price levels and market structure to the ameliorative effects of the present regulation that it seeks to continue. The NYPSC argues that "to wait until New York can establish that there are major problems before allowing it to regulate cellular carriers is not the solution"[91] and that "regulatory oversight [must] remain in place in order to ensure that the affordability of cellular service continues to improve."[92]

B. Regulation for Which Continued Authority Is Sought

40. The NYPSC emphasizes that cellular providers are "lightly regulated" in New York.[93] Under this regulatory scheme the NYPSC permits carriers to file tariffs that establish a range of rates (minimum and maximum rates), effective not less than 30 days from the date of filing. Rate changes within this range can be made with as little as one day's notice to customers and the NYPSC. The NYPSC states that "carrier rates are based on what each carrier believes the market will bear"[94] and contends that this regulatory scheme allows carriers "wide latitude in meeting their initial rates and making changes to those rates in response to competitive forces and customer demand."[95]

41. The NYPSC does not review rate ranges proposed by cellular carriers unless and until a complaint is lodged. Staff review of individual rate changes within the proposed range

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[89] *Id.* at 1 n.1.

[90] NYPSC Petition at 2.

[91] *Id.* at 12.

[92] *Id.* at 8.

[93] *Id.* at 6-7.

[94] NYPSC Reply at 19.

[95] *Id.* at 6.

is limited to ensuring that "carriers are not seeking to engage in discriminatory practices."[96] An evidentiary hearing is required only if a carrier proposes to increase its rates above the maximum set forth in its tariff and the change would increase its gross operating revenues by more than 2.5 percent or $100,000, whichever is greater. Such hearings must be completed in 11 months, and the NYPSC explains that very few are held because it encourages cellular carriers to file rates with "wide flexible rate minimum to maximum ranges."[97]

42. The NYPSC emphasizes that it does not require cellular carriers to file cost information to support tariff rate changes and that it does not set rates based on carrier costs or return on equity.[98] The NYPSC states that its "simplified regulatory approach is aimed at protecting consumers from anticompetitive and discriminatory practices, should the need arise."[99] The NYPSC has provided a copy of its regulations in support of its contentions and in compliance with Section 20.13(a)(4) of our Rules.[100] Section 630.14 of the NYPSC's regulations addresses maximum and minimum rates.[101]

C. Description of New York State Market

43. According to the NYPSC, New York State is divided into 17 Cellular Geographic Service Areas (CGSA), 11 of which encompass Metropolitan and Surrounding Areas (MSAs) and 6 of which cover rural areas (RSAs).[102] Each CGSA, except for one RSA, is served by two cellular carriers. This has been the case in each of the MSAs for the past nine years. All but one of the RSAs have been served by two cellular carriers for at least the last three years. The New York City MSA generates 73 percent of total cellular revenues in the state. Another 20 percent are divided among four Upstate MSAs. The remaining seven percent is

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[96] *Id.*

[97] *Id.*

[98] NYPSC Reply at 17.

[99] *Id.*

[100] 47 C.F.R. § 20.13(a)(4). The NYPSC provided copies of its regulations as Exhibit IV to its Reply. In consequence, challenges by several commenters based on the NYPSC's earlier failure to provide a copy of its regulations no longer have merit. *See* McCaw Comments at 17 n.43; PCIA Comments at 14; Vanguard Comments at 4; NYNEX Comments at 5.

[101] *See* NYPSC Reply at Exhibit IV.

[102] NYPSC Petition at 5-6.

divided among the other 12 CGSAs. The NYPSC states that, "[a]s of June 1994, there were approximately 32 resellers in New York."[103]

V. CASE ON THE MERITS

A. General Positions of the Parties

44. Both NCRA and Nextel[104] vigorously support the NYPSC's Petition to continue intrastate rate regulation of cellular carriers. AMTA, PCIA, E.F. Johnson, and MTel are also supportive of the Petition to the extent that it does not seek to extend rate regulation to paging services or other commercial mobile services. These commenters, and Nextel, deny that disparate rate treatment for cellular and other commercial mobile services controverts the statutory objective of regulatory parity among providers of comparable mobile services.[105]

45. The following commenters oppose the Petition: CCI, CTIA, RTC, SWB, NYNEX, McCaw, GTE, RCA, and Vanguard. Of these, CTIA, RTC, McCaw, GTE, and RCA argue that singling out cellular services for rate regulation is prohibited by Section 332 of the Act.[106] PageNet, PageMart, and E.F. Johnson oppose the Petition only with respect to paging services, arguing that the NYPSC has failed to sustain its burden of proof with respect to those services.

46. The NYPSC argues, in essence, that the duopolist nature of the cellular industry, *per se*, provides sufficient evidence of failed market conditions to authorize continued rate regulation by the state. It contends that:[107]

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[103] Presumably, the NYPSC is referring here to the New York City MSA; it does not refute CCI's statement to this effect elsewhere in the record. *See* CCI Comments at 18. The NYPSC does allege with respect to resellers, however, that they are "wholly dependent upon either of the two underlying carriers in any market area" and that "[t]he presence of multiple resellers does not itself indicate effective competition." NYPSC Petition at 5 n.2 (emphasis in original omitted).

[104] However, Nextel opposes state rate regulation of "emerging non-dominant CMRS carriers, including ESMR and PCS providers." Nextel Comments at 12.

[105] Nextel Reply at 3-7; AMTA Comments at 6-7; PCIA Comments at 1; E.F. Johnson Comments at 4; MTel Comments at 6; MTel Reply at 5, *citing CMRS Third Report and Order*, 9 FCC Rcd at 8009, 8014. MTel argues that the test for technical and operational rules, in terms of uniformity, is different from that applicable to forbearance.

[106] RTC Comments at 5 and RTC Reply at 3; McCaw Comments at 9; GTE Comments at 6-12; GTE Reply at 3-6; RCA at 3-4; CTIA Reply at 7-10, *citing CMRS Third Report and Order*, 9 FCC Rcd at 7994. CTIA likens the policy here to that applicable to forbearance.

[107] *Id.* at 3-4. The NYPSC contends that no alternative "voice-grade" mobile services presently exist in the New York market. This definition of substitutability is challenged by several commenters.

> [e]ffective competition requires strong mutual pressure on firms to perform well (by minimizing costs, by holding prices down to these costs, by providing good service quality and by innovating rapidly) in order to survive. However, in a market such as the cellular market, where there are only two providers of a service and there are no currently available substitutes, actions taken by one firm may not result in a normal competitive reaction by the only other firm.
>
> With but one real competitor in each market area, a cellular provider has less incentive to innovate or price competitively than it would in a multi-vendor market. Therefore, absent a fully competitive market, continued light rate regulation is required to ensure that rates do not become discriminatory, unjust or unreasonable.

47. In support, NCRA and Nextel argue that facilities-based cellular providers have a "transmission bottleneck" that enables them to limit competition and "exact supracompetitive profits from the public."[108] NCRA contends that the duopolist nature of the cellular industry warrants continued state rate regulation and alleges, in support, that "since 1985, the [FCC] has classified licensed cellular carriers as dominant common carriers" and has[109]

> tentatively conclud[ed] that cellular carriers should have equal access obligations imposed upon them in accordance with the [FCC's] findings that there is not sufficient evidence to conclude that the cellular services marketplace is fully competitive.

NCRA has listed in an appendix to its comments the reports of eight Federal agencies which it alleges have concluded that the cellular industry is anticompetitive.[110]

48. Nextel, too, argues that the duopolist character of the cellular industry compels us to grant New York's Petition:[111]

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[108] Nextel Comments at 13. *See* NCRA Comments at 3.

[109] NCRA Comments at 4, *citing CMRS Second Report and Order*.

[110] The list includes the *CMRS Second Report and Order*; Memorandum of the United States in Response to Bell Companies' Motions for Generic Wireless Waivers, Department of Justice, Civ. Action No. 82-0192, July 25, 1994; Memorandum of the United States in Opposition to AT&T's Motion for a Waiver of Section 1(D) of the Decree in Connection with its Acquisition of McCaw, Department of Justice, Feb. 14, 1994. With respect to these filings, NYNEX, particularly, contends that NCRA's reliance upon DOJ's findings is misplaced because "none of the documents relied upon by the Department of Justice . . . address[es] the state of cellular competition in New York." NYNEX Reply at 3 n. 7.

[111] Nextel Comments at 9-10 (footnotes in original omitted).

> The future CMRS marketplace is only beginning to develop. It is anticipated, for instance, that approximately six alternative CMRS providers, including PCS, cellular, and wide area SMR, ultimately will provide comparable service in any given geographic area. If this were presently the case, there would be little doubt that state regulation of all classes of CMRS would be preempted. However, the current CMRS market is far more limited. Accordingly, the Commission is forced to make its preemption determinations based only on its analysis of a single class of CMRS -- cellular service. Unfortunately, the cellular industry has historically exhibited duopoly market conditions and has been a source of continuing concern for the petitioning states.

49. On the issue of substitutability and consequent competition from other types of commercial mobile services, Nextel contends that there are presently no "voice-grade" mobile services offering viable competition to cellular service. Nextel points out that:[112]

> PCS spectrum has not yet been assigned and will not pose a competitive threat to cellular operators until proposed systems are constructed and placed into operation. Even in the most commercially attractive markets, this could take a minimum of several years, during which cellular operators will be permitted to enhance their already considerable market position. Moreover, although Nextel has made impressive strides in implementing its ESMR service in California, it cannot yet challenge the significant market power of cellular incumbents....
>
> There is no near-term competition in the wireless marketplace sufficient to discipline the current cellular marketplace. Until effective competition develops, continued rate regulation may be necessary in some states to restrain the dominant market power of cellular duopolists.

50. In opposition, many commenters emphasize that the existence of a duopolist market structure and arguments that the market is thus less than "fully competitive" are, of themselves, insufficient to sustain the state's burden of proof.[113] They argue, further, that the mere "threat" of future problems absent continuing regulation is insufficient to require us to grant the New York Petition.[114] One commenter, in particular, points out that "[t]he NYPSC never explicitly claims that its cellular marketplace is anticompetitive or that rates are unjust or unreasonable or discriminatory," and that the State's Petition is grounded on a policy of "deterrence," which is not a statutorily cognizable basis for authorizing continuing rate

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[112] Nextel Reply at 9-10 (footnotes in original omitted), *citing CMRS Second Report and Order*, 9 FCC Rcd at 1470.

[113] NYNEX Reply at 3; McCaw Comments at 5; CCI Comments at 16-18; CTIA Comments at 7-10; GTE Reply at 11; RTC Comments at 4-6; RTC Reply at 2; PageNet Comments at 3.

[114] CCI Comments at 15; PCIA Comments at 12.